# THE ATTITUDE OF AMERICAN COURTS TOWARDS RESTRICTIVE LABOR LAWS.

ATTENTION has frequently been called to the tendency of written constitutions to limit the field for experimental legislation. In no department of law-making has this seemed to be more the case in the United States than in that pertaining to labor. While the Parliament of Great Britain has continuously expanded the labor code by adding each session some new regulation, the efforts in the same direction of American state legislatures have again and again been balked by the decision of the courts that their enactments were unconstitutional. This has been unfortunate, not only because it has at times prevented the enforcement of wise regulations, but also because it has implanted in the minds of workingmen a thorough distrust of the courts. Workingmen are not usually able to follow the subtle reasoning on which judicial decisions rest, and when they observe laws designed for their protection repeatedly nullified by the courts they soon come to believe that the latter are opposed to the cause of labor

It is the purpose of this article to review recent decisions involving the question of the constitutionality of restrictive labor laws, in order to determine whether the courts are really so bound by our written constitutions as some of these decisions seem to imply. I may say, at once, that the conclusion to which I have been brought is that under the flexible provisions of our constitutions the question of the constitutionality of a restrictive labor law is inseparably connected with the question of the wisdom of such a law. In other words, granted that a restriction is wise under the given conditions, it is an easy task to prove that it is also constitutional. If this view is correct no amendments to American constitutions will be needed to provide the country with as comprehensive labor codes as are found abroad. All that will be required is the conversion of American judges to belief in the beneficence of this species of legislation.

A review of cases in which labor laws have been declared un-

constitutional shows that the decisions rest nearly always either on the ground that such laws interfere with the freedom of contract, or on the ground that they involve special or class legislation. Two illustrations will make this clear. In 1881 the legislature of Pennsylvania enacted a law prohibiting the practice, then common in the mining districts of the state, of paying wages in orders for goods against a company store. In passing upon this act five years later the supreme court of the state used the following language:

> These sections are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country can not be done; that is, prevent persons who are *sui juris* from making their own contracts. They are an infringement alike of the right of the employer and the employee; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void.[1]

From the vigorous language of this decision one would be led to infer, as the court in fact declares, that no law which prevented "persons who are *sui juris* from making their own contracts" could be constitutional. How far this is from the truth, will appear as we review later decisions.

An illustration of a labor law declared unconstitutional on the ground that it was special or class legislation is furnished by the records of the supreme court of California. The legislature of that state passed, in 1895, a law prohibiting the labor of barbers on Sundays and holidays after twelve o'clock noon. A case involving this act came before the supreme court of the state in the following year, when it was thus characterized:

> By this law the laboring barber, engaged in a most respectable, useful and cleanly pursuit, is singled out from the thousands of his fellows in other employments and told that, willy nilly, he shall not work upon

[1] Godcharles & Company *v.* Wigeman, 113 Pennsylvania State Reports, p. 431.

holidays and Sundays after twelve o'clock noon. His wishes, tastes or necessities are not consulted. If he labors, he is a criminal. Such protection to labor, carried a little further, would send him from the jail to the poorhouse. How comes it that the legislative eye was so keen to discern the needs of the oppressed barber, and yet was blind to his toiling brethren in other vocations? Steam-car and street-car operatives toil through long and weary Sunday hours; so do mill and factory hands. There is no Sunday period of rest and no protection for the overworked employees of our daily papers. Do these not need rest and protection? The bare suggestion of these considerations shows the injustice and inequality of this law. In brief, whether or not a general law to promote rest from labor in all business vocations may be upheld as within the due exercise of the police power as imposing for its welfare a needed period of repose upon the whole community, a law such as this certainly cannot. A law is not always general because it operates upon all within a class. There must be back of that a substantial reason why it is made to operate only upon a class, and not generally upon all.[1]

This decision is less sweeping than that previously cited. It recognizes that the right to work on Sundays and holidays may be restricted by the legislature in the exercise of its police power. It also recognizes that a law applying only to a class may be sustained, if there is apparent to the court some sound reason for limiting it to the class. In the case at bar it finds no justification for Sunday legislation applying to barbers only, and it therefore declares such legislation unconstitutional.

Before considering the significance of these decisions, it will be well to recall the legal grounds upon which the rights freely to contract and to immunity from special or class legislation are based. The right freely to contract is not expressly guaranteed in any state constitution. It is held to be implied, however, in the "right to life, liberty, and property" which is made prominent in all of them. Thus as defined by the courts, "liberty" means, to quote from a recent Illinois decision,

not only freedom of the citizen from servitude and restraint, but . . . the right of every man to be free in the use of his powers and faculties,

[1] *Ex parte* Jentzsch, 44 Pacific Reporter, p. 803. Useful abstracts of this decision and of many of those which follow will be found in the Bulletins of the United States Bureau of Labor.

and to adopt and pursue such vocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. . . . Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession and power of disposition which may be acquired over it. And the right of property preserved by the constitution is the right not only to possess and enjoy it, but to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen in the exercise of the liberty guarantied may choose to adopt. Labor is the foundation of all wealth. The property which each one has in his labor is the common heritage. And, as an incident to the right of acquiring property, the liberty to enter into contracts by which labor may be employed in such way as the laborer may deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty.[1]

"The privilege of contracting" is thus, as was affirmed by the same court in a later decision, "both a liberty and a property right."[2] The prohibition of special or class legislation is explicit in all of the state constitutions. There can therefore be no doubt of the universality of these rights in the American commonwealths. Moreover, the first section of the fourteenth amendment of the federal constitution is quite generally held to protect these fundamental rights as among the "privileges and immunities of citizens of the United States," disregard of which is inconsistent with "due process of law." This is important chiefly because it makes possible an appeal to the United States supreme court when these rights are infringed, and has enabled that tribunal to lay down certain very important principles in regard to the scope of the police power in connection with the regulation of labor conditions. The rights with which restrictive labor laws usually conflict are thus protected by both the state and federal constitutions. This does not mean, of course, that they are inviolable. In the exercise of its police power, a state legislature may set aside these along with other merely private rights. The question as to the constitutionality of restrictive labor laws thus reduces itself to that of the scope of the police power.

[1] Braceville Coal Company *v.* The People, 35 Northeastern Reporter, p. 62. Ritchie *v.* People, 55 Illinois Reports, p. 98.

In his valuable work on *The Police Power*, Professor Freund defines it "as the power of promoting the public welfare by restraining and regulating the use of liberty and property." Helpful as this definition is as a means of distinguishing the power of police from other powers, it obviously throws little light on the scope of this power. The only way to determine whether a given statute designed to promote the public welfare is or is not a legitimate exercise of the police power is to examine the authoritative decisions in which similar statutes are involved. Confused and conflicting as are these decisions, it is believed that a study of them justifies the contention that in the field of labor restrictions the courts will sustain any measure which they think really calculated to promote the public welfare.

Attention has already been called to the decision of the supreme court of Pennsylvania that a truck act was unconstitutional because it interfered with the freedom of the workman to sell his labor and of the employer to buy it on such terms as were mutually satisfactory. We may compare this with other decisions involving the truck acts of other states. Such acts have been declared unconstitutional in Illinois, Kansas and Indiana; and have been approved or sustained in Colorado, Kentucky and Tennessee, the law of the last mentioned state being also upheld by the federal supreme court. The first two decisions, rendered in 1892 and 1899, respectively, use nearly as strong language as that of the Pennsylvania court already quoted. The supreme court of Illinois affirms that

> the police power of the state is limited to enactments having reference to the comfort, the safety and the welfare of society, and under its guise a person cannot be deprived of a constitutional right. Under it an adult person of sound mind, laboring under no legal disability, cannot be deprived of the right to make contracts in respect to labor and the acquisition of property, under the pretence of giving such person protection.[1]

The supreme court of Kansas is even more vigorous in its disapproval of this species of legislation. It finds fault with the

[1] Frorer *et al. v.* The People, 141 Illinois Reports, p. 171.

particular act brought before it because it applies only to "corporations or trusts employing ten or more persons." Such a limitation appears to it to involve indefensible discrimination. It also condemns the very principle of truck legislation. Among other things it declares:

Such legislation suggests the handiwork of the politician rather than the political economist. It has been sought by some judges to justify legislation of this kind upon the theory that, in the exercise of police power, a limitation necessary for the protection of one class of persons against the persecution of another class may be placed upon freedom of contract. As between persons *sui juris*, what right has the legislature to assume that one class has the need of protection against another? In this country the employee to-day may be the employer next year, and laws treating employees as subjects for such protective legislation belittle their intelligence and reflect upon their standing as free citizens. It is our boast that no class distinctions exist in this country. An interference by the legislature with the freedom of the citizen in making contracts, denying to a part of the people, possessing sound minds and memory, the right to bargain concerning the equivalent they may desire to receive as compensation for their labor, is to create or carve out a class from the body of the people and place that class within the pale of protective laws which invidiously distinguish them from other free citizens; thus dividing by arbitrary fiat equally free and intelligent people into distinctive classes or grades, the one marked by law as the object of legislative solicitude, the other not. . . . Laws which infringe upon the free exercise of the right of a workingman to trade his labor for any commodity or species of property which he may see fit, and which he may consider to be the most advantageous, are an encroachment upon his constitutional rights and an obstruction to his pursuit of happiness. Such laws as the one under consideration class him among the incompetents and degrade his calling.[1]

These citations serve sufficiently to indicate the grounds upon which truck acts have been condemned.[2] The courts of Penn-

[1] State *v.* Haun, 59 Pacific Reporter, p. 340.

[2] The decision nullifying the truck act of Indiana need not detain us, since it was based entirely on the ground that the act applied only to employees in or about coal mines and that this was indefensible special or class legislation. The general attitude of the supreme court of Indiana is more accurately indicated by the deci-

sylvania and Illinois deny flatly the right of the legislature to interfere with the freedom of the labor contract between persons *sui juris*. The court of Kansas, rendering its decision some years later, recognizes the possibility that such interference may be justified as an exercise of the police power, but repudiates the idea that wage-earners as a class need any such protection as the truck act proposed to extend to them. It may be noted incidentally that the question as to whether by such a law the legislature "carves out a class from the body of the people," or simply recognizes the existence of a class already in being, is one not of law but of industrial fact. The truck act of Kansas may have been "the handiwork of the politician," but it is certainly misleading to imply, as does the court, that such legislation does not now enjoy the sanction of intelligent political economists.

The decisions approving truck legislation bring out clearly the economic arguments in favor of such interference. In replying to an interrogatory formally addressed to it by the state legislature the supreme court of Colorado declared on March 30, 1897, that

> a majority of the court are of the opinion that the legislature may, in the exercise of its police power, enact laws of this character when necessary to prevent oppression and fraud, and for the protection of classes of individuals against unconscionable dealings.[1]

And it continues:

> We may properly take cognizance of the fact that the most serious disturbances which have occurred in this country for the last twenty-five years have grown out of controversies between employer and employee. No one doubts the authority or questions the duty of the state to interfere with such force as may be necessary to repress such disturbances and maintain the public peace and tranquillity;

sion it handed down on the same day (Nov. 25, 1902) as that involving the truck act, upholding the constitutionality of a law prohibiting the assignment of future wages on the ground that "the situation of [wage-earners] renders them peculiarly liable to imposition and injustice at the hand of employers, unscrupulous tradesmen and others who are willing to take advantage of their condition." (65 Northeastern Reporter, p. 521.)

[1] 48 Pacific Reporter, p. 512.

and as well may the state provide in advance against certain kinds of fraud and oppression which lead to these outbreaks.

The supreme court of Kentucky sustained on September 27, 1900, the act of that state which requires "that all persons, associations, companies and corporations employing the service of ten or more persons in any mining work" in the state shall on or before the 16th of each month pay in full in lawful money the wages agreed upon for the previous month. The requirement that wages be paid in lawful money was not in question in this decision, because Kentucky had embodied a truck clause in her constitution.[1] The affirmation that limiting the act to enterprises employing ten or more persons did not render it special legislation is, however, in interesting contrast with the contrary view of the supreme court of Kansas. The Kentucky tribunal says:

We think the classification or apparent discrimination made in the statute is permissible, because it is natural and reasonable and, moreover, entirely consistent with the end sought to be accomplished by the organic law. The abuse sought to be corrected was the imposition practised on the miners by the operators of mines by forcing them, directly or indirectly, into dealing with the "company stores," where goods at exorbitant prices were paid for wages instead of money. This evil can hardly be practised at small concerns, or where less than ten miners are employed. In effect, the lawmakers said there is in small concerns using less than ten men practically no such evil as the constitution seeks to suppress; therefore we ignore the small concerns, and apply the benefit of the constitutional provision to that portion of the class only which needs the benefit.[2]

This seems to be a conclusive answer to the objection that such a limitation involves special legislation.

The most exhaustive decision sustaining a truck act is that rendered by the supreme court of Tennessee on November 8, 1899. The act in question differs from the ordinary prohibition of payment of wages in scrip or in orders on a company

[1] Section 244: "All wage-earners in this state employed in factories, mines, workshops, or by corporations shall be paid for their labor in lawful money."

[2] 58 Southwestern Reporter, p. 441.

store in that it seeks to attain the same end by requiring employers paying in "orders" of any sort to redeem the latter in lawful money on demand.[1] After explaining at length the significance of the phrases "law of the land" and "due process of law" contained in the state and federal constitutions, the court says:

The legislature evidently deemed the laborer at some disadvantage under existing laws and customs, and by this act undertook to ameliorate his condition in some measure by enabling him, or his *bona fide* transferee at his election, and at a proper time, to demand and receive his unpaid wages in money rather than in something less valuable. Its tendency, though slight it may be, is to place the employer and employee upon equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation. . . .

Furthermore, the passage of the act was a legitimate exercise of the police power, and upon this ground also the legislation is well sustained. . . . Besides the amelioration of the employee's condition, the act was intended and is well calculated to promote the public peace and good order and to lessen the growing tendency to strife, violence and even bloodshed in certain departments of important trade and business.

. . . Such being the character and tendency of the act, we have no hesitation in holding that it is valid, both as general legislation, without reference to the state's reserved police power, and also as a wholesome regulation adopted in the proper exercise of that power.[2]

The reasoning of this decision is all the more significant, because when the case was appealed to the federal supreme court that tribunal declared that "the supreme court of Tennessee justified its conclusions by so full and satisfactory a reference to the decisions of this court as to render it unnecessary for us to travel over the same ground"[3] and itself sustained the law.

A comparison of these different decisions appears to justify the conclusion that the constitutionality of truck legislation depends upon the reality of the abuses that such legislation is intended to correct. If, as a matter of fact, workmen constitute a class in the community that needs special protection because specially exposed to unfair treatment by unscrupulous employers, the high-sounding

[1] Act of March 23, 1899. [2] 53 Southwestern Reporter, p. 955.
[3] Oct. 21, 1901, 22 Supreme Court Reporter, p. 1.

phrases of the Kansas decision lose all point. If, as a matter of fact, the company-store abuse is the cause of "strife, violence, and even bloodshed" between workmen and employers, the police power may be called in to suppress it. If, finally, as a matter of fact, these evils arise only where enterprises employ ten or more men, then limiting the prohibition to such enterprises is a reasonable and proper restriction, not open to the constitutional objection that it involves special or class legislation. In the earlier decisions cited the courts were vehement in their condemnation of attempts to restrain freedom of contract in reference to wages; but at the same time they were enforcing, as a matter of course, usury laws imposing even more drastic restrictions upon freedom of contract with reference to interest. The latter were approved because their utility was appreciated. The former were condemned because the judges had in mind the conditions of an earlier industrial society in which wage-earners were not a class by themselves and consequently were not in need of special protection. As the need of such restrictions becomes manifest, may we not be certain that doubts in regard to their constitutionality will vanish?

The Sunday labor of barbers has been the frequent object of legislative solicitude. In the decision cited the California statute limiting such labor was declared unconstitutional on the ground that it involved special or class legislation. Similar measures have been condemned on the same ground in Missouri,[1] Illinois [2] and Washington.[3] In New York, Michigan, Tennessee, Minnesota and Oregon, on the other hand, the state legislatures have been upheld in enacting Sunday closing laws applying only or in a special way to barbers. Moreover, the United States supreme court has upheld such legislation in a case appealed to it under the Minnesota law. The arguments in support of Sunday laws applying only to barbers will appear from a few extracts from these decisions.

In rendering its decision the New York court of appeals used the following language:

[1] Act of March 18, 1895, in State *v.* Grauneman, 33 Southwestern Reporter, p. 784.

[2] Act of June 26, 1895, in Eden *v.* People, 43 Northwestern Reporter, p. 1109.

[3] Ordinance of City of Tacoma, 46 Pacific Reporter, p. 255.

It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from over-work and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare. . . . As barbers generally work more hours each day than most men, the legislature may well have concluded that legislation was necessary for the protection of their health. We think that this statute was intended and is adapted to promote the public health, and thereby to serve a public purpose of the utmost importance.[1]

It is, therefore, the court concluded, a legitimate exercise of the police power.

The Minnesota act was peculiar in that it prohibited all Sunday labor except works of necessity or charity and added, "provided, however, that keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards shall not be deemed a work of necessity or charity." In passing on the question whether this proviso did not involve special or class legislation the supreme court of the state said:

The object of the law was not to interfere with those who wish to be shaved on Sunday, or primarily to protect the proprietors of barber shops, but mainly to protect the employees in them by insuring them a day of rest. . . . Courts will take judicial notice of the fact that, in view of the custom to keep barber shops open in the evening as well as in the day, the employees in them work more, and during later, hours than those engaged in most other occupations, and that this is especially true on Saturday afternoons and evenings; also that, owing to the habit of so many men to postpone getting shaved until Sunday, if such shops were to be permitted to be kept open on Sunday the employees would ordinarily be deprived of rest during half of that day. In view of all these facts we cannot say that the legislature has exceeded the limits of its legislative police power in declaring that, as a matter of law, keeping barber shops open on Sunday is not a work of necessity or charity.[2]

The decision of the federal supreme court added nothing to this

[1] People *v.* Havnor, 43 Northeastern Reporter, p. 541 (Apr. 14, 1896).
[2] State *v.* Petit, 77 Northwestern Reporter, p. 225.

reasoning but gave it the weight of its authority by quoting it at length in its own opinion sustaining the law.[1] Its view was accepted as conclusive by the supreme court of Oregon, which declared, in sustaining the Sunday closing law for barbers of that state, that if the classification on which it rested is "not in conflict with the federal constitution, it is necessarily not in conflict with our own."[2]

A comparison of these decisions indicates the grounds on which the courts hold a statute to be or not to be special or class legislation. As Professor Freund has summarized the principle: "Where a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the classes omitted."[3] In some of the states the courts have failed to see anything about the business of barbers which justifies special Sunday legislation for their protection. In other jurisdictions full weight has been given to the peculiarities of this trade: the tendency to keep open evenings and Sunday mornings to accommodate customers who might with little inconvenience come at other times and, consequently, to require excessively long hours of attendance on the part of employees. With these peculiarities in mind, one can easily answer such objections as were urged by the supreme court of California against legislation of this character.[4] The view that it is oppressive to the barbers themselves is readily disposed of by the consideration that it is these very barbers who most eagerly desire it. It is of no advantage to them as a class to incur serious discomfort for the accommodation of customers when a little compulsion would cause these customers to come at more convenient hours. It is not the eagerness of barbers to work seven days in the week that causes their shops to be kept open on Sundays, but the pressure of an unregulated competition which they would be only too glad to restrain. The comparison of barbers with "street-car operatives" and the "employees of our *daily* newspapers" which the court suggests is quite beside the mark, for the obvious reason that in the case of the latter suspension of labor on Sun-

[1] 20 Supreme Court Reporter, p. 666 (April 9, 1900).
[2] 69 Pacific Reporter, p. 445 (July 7, 1902).
[3] The Police Power, p. 755. [4] *Supra*, pp. 590, 501

days would mean not merely the concentration of work in the other days of the week but the entire deprivation of the public of services upon which its wellbeing largely depends. The fact that these classes also need "rest and protection," granting that this is the case, is no valid objection to protecting barbers by a law well adapted to their industry but not at all suited to the others mentioned. It is not necessary to follow these considerations further to show that when a law extending protection to a special class is really beneficent and equal in its operation the constitutional objections to it fall away. Here, as in the case of the truck acts already considered, the constitutional and the economic aspects of the question are so intimately related that we may be certain that a court which believes a protective law economically desirable will find it legally admissible.

Truck acts and special Sunday closing laws are measures of relatively slight moment to the people of the United States. The attention devoted to them is justified only by the importance of the principles involved in the decisions to which they have given rise. I come now to a series of decisions of quite a different character. No labor question has been more prominently before the American public in recent years than that as to the proper length of the working day. Until quite lately it has been assumed that this was a matter with which state legislatures could not interfere, except as regards minors, women and public employees. The decisions which have reversed this opinion, at least for some of the states, merit careful consideration because they have made valid more extreme protective labor laws than are yet to be found in any European country. The first law of this character to be finally sustained by the courts was the ten-hour law applying to bake-shops passed in 1895 by the legislature of New York state. Before this statute came before the courts, however, the Utah eight-hour law of 1896, applying to mines and smelters, had been sustained not only by the supreme court of that state, but by the federal supreme court. The latter legislation thus merits prior consideration.

When Utah was admitted to statehood in January, 1896, it had as one of the novel features of its constitution an article (article xvi) treating exclusively of labor. Among other things

this article directed (section 6) that "the legislature shall pass laws to provide for the health and safety of employees in factories, smelters and mines." Acting under this general authority the legislature passed during its first session a statute making eight hours a day the period of employment in mines and smelters, "except in cases of emergency where life or property is in imminent danger," and penalizing violations as misdemeanors. Test cases were brought before the supreme court of the state in the same year, and the act was sustained as regards both mines and smelters.[1] The cases were promptly appealed to the supreme court of the United States, which rendered its decision, also sustaining the law, on February 28, 1898.[2] The following abstract of these decisions indicates sufficiently the grounds upon which they rested.

In its first decision[3] sustaining the law, so far as it applies to mines, the supreme court of Utah quotes at length from the labor article of the constitution to show that the protection of labor is one of the functions of the legislature. It then describes the nature of underground mining to show that a limitation on the hours of work for miners is a proper health measure. "We cannot say," it concludes, "that this law, limiting the hours of labor in underground mines to eight hours each day, is not calculated to promote health." Turning, then, to the question whether the act interferes with constitutional rights, it justifies the measure as imposing a proper restraint on personal liberty and as free from the taint of special or class legislation. "Some pursuits," it declares,

> are attended with peculiar hazards and perils, the injurious consequences from which may be largely prevented by precautionary means, and laws may be passed calculated to protect the classes of people engaged in such pursuits. It is not necessary to extend the protection to persons engaged in other pursuits not attended with similar dangers. To them the law would be inappropriate and idle. So, if underground mining is attended with dangers peculiar to it, laws

[1] Holden *v.* Hardy (Oct. 29, 1896), 46 Pacific Reporter, p. 756; State *v.* Holden (Nov. 11, 1896), 46 Pacific Reporter, p. 1105.

[2] Holden *v.* Hardy, 18 Supreme Court Reporter, p. 383.

[3] 46 Pacific Reporter, p. 756.

adapted to the protection of such miners from such danger should be confined to that class of mining, and should not include other employments not subject to them.

Believing this to be the case, the court upholds the law. Finally, it shows by citations from the decisions of other courts that the act may be defended as a legitimate exercise of the police power.

The second decision[1] of the Utah court sustains, by a similar line of reasoning, the part of the act applying to smelters. It alludes briefly to the noxious gases that must be inhaled by persons engaged in this industry and concludes that a restriction on the hours of employment is a proper health regulation. "Twelve hours a day would be less injurious than fourteen, ten than twelve, and eight than ten. The legislature has named eight. Such a period was deemed reasonable." After a brief reference to the peculiar constitutional provisions of Utah in regard to labor, it adds:

> Nor do we wish to be understood as intimating that the power to pass the law does not exist in the police powers of the state. The authority to pass laws calculated and adapted to the promotion of the health, safety or comfort of the people, and to secure the good order of society and the general welfare, undoubtedly is found in such police powers.

The act may thus be defended as consonant with the labor article of the state's constitution and also as a legitimate exercise of the police power, shared by all the states.

The decision of the federal supreme court affirming the judgments of the supreme court of Utah was delivered by Mr. Justice Brown, Justices Brewer and Peckham dissenting. It is especially valuable because it presents a comprehensive review of earlier decisions interpreting the fourteenth amendment and outlining the scope of the police power of the states. The parts immediately applicable to the Utah statute are summarized in the following extracts.

After showing that the mining industry has long been recognized as one requiring regulation to protect the lives of miners, it continues:

[1] 46 Pacific Reporter, p. 1105.

But if it be within the power of the legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. . . . With this end in view . . . laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the states, they have been generally upheld. . . . Upon the principles above stated, we think the act may be sustained as a valid exercise of the police power of the state. . . . [The employments of mining and smelting], when too long pursued, the legislature has judged to be detrimental to the health of the employees; and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts. While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operator is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature or to the influence of noxious gases generated by the processes of refining or smelting.[1]

It then quotes with approval a considerable part of the decision of the Utah court in the second case referred to above, closing with the sentence:

Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety or comfort of the people, or to secure good order or promote the general welfare, we must resolve them in favor of the right of that department of government.

Continuing it says:

The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would

[1] 18 Supreme Court Reporter, pp. 383 *et seq.*

pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently, under the statute, is the only one liable, his defence is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the state must suffer.

The federal supreme court thus not only endorses the reasoning of the supreme court of Utah at every point, but it adds important considerations of its own, all favorable to the constitutionality of the statute. It recognizes that mining and smelting are peculiarly dangerous and unhealthful employments. It sees no reason why the police power should not embrace the protection of health and morals as well as that of life and property. It approves of restrictions on hours as means of protecting health. On these grounds the act is well sustained. But it goes further. It believes that large discretion in the exercise of the police power should be left to the legislative branch of the government; that employers and employees sometimes bargain on unequal terms and that at such times the legislature may properly interfere; finally, that the legislature has the right, when this is the case, to protect a man even "against himself."

In laying down the above principles the court had in mind, of course, the limitations imposed by the fourteenth amendment, not those contained in the state constitutions. How little immediate influence its reasoning had upon the minds of some of the judges of the state courts was illustrated a year later (July 17

1899), when the supreme court of Colorado rendered a decision declaring unconstitutional an act copied word for word from the Utah eight-hour law. A brief summary of this decision[1] will show that, at least at one point, the Colorado court disagrees in principle with the United States supreme court.

At the outset the decision alludes to the history of the Utah statute, but tries to minimize the significance of the decisions sustaining it by connecting them with the peculiar provisions of Utah's constitution. After pointing out that there are no similar provisions in the constitution of Colorado, it proceeds to demonstrate that such a law is not a legitimate exercise of the police power by the following reasoning:

> Were the object of the act to protect the public health, and its provisions reasonably appropriate to that end, it might be sustained; for in such a case even the constitutional right of contract may be reasonably limited. But the act before us is not of that character. In selecting a subject for the exercise of the police power, the legislature must keep within its true scope. The reason for the existence of the power rests upon the theory that one must so use his own as not to injure the public health, safety, morals or general welfare. How can an alleged law that purports to be the result of an exercise of the police power be such in reality when it has for its only object, not the protection of others, or the public health, safety, morals or general welfare, but the welfare of him whose act is prohibited, when, if committed, it will injure him who commits it, and him only?

That this view is squarely opposed to that of the United States supreme court that the legislature may protect a man even "against himself" is obvious. As Professor Freund says, in commenting upon the above decision:

> The right to choose one course of action even to the extent of incurring risks, where others are not concerned, is a part of individual lib-

[1] 58 Pacific Reporter, p. 1071. The sequel of this decision was an amendment to the Colorado constitution expressly conferring upon the legislature the power which the state supreme court denied to it. This was submitted to the people on March 14, 1901, and adopted the following year. How close a connection this embittered struggle to secure the eight-hour day may have had with the sanguinary labor troubles from which Colorado has recently suffered, only those on the ground can judge.

erty. . . . It is, however, a fallacy to transfer this argument from the individual to the particular class, and to say that the police power has no business to protect the class against its own acts. . . . If the health of the class is impaired by long hours of work under unsanitary conditions, a public interest exists which may set the police power in motion.[1]

In other states than Colorado the influence of the federal decision has been more marked. In at least four instances it has been accepted as determining, and laws restricting the hours of labor of adult men in special employments have been sustained. The first of these is a law of Missouri, passed March 23, 1901, which forbids the employment of persons in underground mines for more than eight hours a day. With it should be grouped as a second instance the eight-hour law applying to underground mines and smelters passed by the state of Nevada on February 23, 1903. These statutes are so similar to that of Utah that no new considerations are brought out in the decisions[2] upholding them. The third instance is a law of Rhode Island, passed April 4, 1902, which limits the hours of street railway employees to ten a day. As the supreme court of that state declared, if the Utah law is a legitimate exercise of the police power, the Rhode Island statute "is more clearly within such power, for the triple reason that it deals with public corporations, the use of a public franchise, and a provision for public safety."[3]

The fourth instance is the more significant New York law limiting the hours of employment in bake-shops in that state to ten a day. This is more nearly parallel with the Utah law, and the decision of the court of appeals sustaining it, which was rendered on January 12, 1904, has been justly heralded as "one of the most important decisions handed down by [that tribunal] in recent years."[4] The facts that it was reached by the close vote of four to three and that five of the seven judges sitting saw

[1] The Police Power, p. 142.

[2] State *v.* Cantwell *et al.*, 78 Southwestern Reporter, p. 569; *in re* Boyce, 75 Pacific Reporter, p. 1.

[3] July 27, 1902, 54 Atlantic Reporter, p. 602.

[4] People *v.* Lochner, 177 N. Y. Reporter, p. 145. A good summary of this decision is given in the Bulletin of the New York Department of Labor, March, 1904, pp. 37–43.

fit to hand down opinions, which together fill forty-four pages of the official record, add to its interest. A brief summary will suffice to indicate the grounds upon which the decision rested.

Chief Judge Parker, speaking for the majority of the court, prefaces his opinion with a review of the decisions outlining the scope of the police power similar to that in the federal decision on the Utah case. Coming to the question at bar, he continues:

It can be safely said that the family of to-day is more dependent upon the baker for the necessaries of life than upon any other source of supply. This being so it is within the police power of the legislature to so regulate the conduct of that business as to best promote and protect the health of the community. . . . Why should any one question the object of the legislature in providing . . . that "no employee shall be required or permitted to work" in such an establishment "more than sixty hours in any one week," an average of ten hours for each working day? It is but reasonable to assume from this statute as a whole that the legislature had in mind that the health and cleanliness of the workers, as well as the cleanliness of the work-rooms, was of the utmost importance, and that a man is more likely to be careful and cleanly when well, and not overworked, than when exhausted by fatigue, which makes for careless and slovenly habits and tends to dirt and disease. If there is opportunity — and who can doubt it? — for this view, then the legislature had the power to enact as it did, and the courts are bound to sustain its action as justified by the police power.

After referring to the decision in the Utah case and pointing out that it is "controlling so far as the fourteenth amendment is concerned, and should be controlling in this court so far as equivalent provisions of our state constitution are concerned," he goes on to say:

It must also be held, under the authority of Havnor's case[1] — even though it may be assumed from the reading of the statute that the object of the legislature is to protect employees in such establishments from working more than ten hours a day — that it is within the police power and therefore not repugnant to the state constitution. . . . Many medical authorities classify workers in bakers' and confection-

[1] This was the case under the Sunday closing law applying to barbers already referred to, *supra*, p. 599.

ers' establishments with potters, stone-cutters, file-grinders, and other workers whose occupation necessitates the inhalation of dust particles and hence predisposes its members to consumption.

In view of this fact it may reasonably be regarded as a dangerous trade requiring special regulation.

This latter aspect of the case, which brings it into the same class as the Utah statute, is made prominent also in the concurring opinion of Judge Vann. He says:

> The evidence, while not uniform, leads to the conclusion that the occupation of the baker or confectioner is unhealthy and tends to result in diseases of the respiratory organs. As statutes are valid which provide that women or children shall not be employed in any manufacturing establishment more than a certain number of hours in a single day, so I think an act is valid which provides that in an employment which the legislature deems, and which is, in fact, to some extent, detrimental to health, no person, regardless of age or sex, shall be permitted or required to labor more than a certain number of hours per day or week. Such legislation under such circumstances is a health law and is a valid exercise of the police power.

The limitation of work in bake-shops to ten hours a day or sixty hours a week is thus justified as a health law whether it be looked at as a means of securing greater cleanliness in such establishments, and thus protecting the public health, or whether it be regarded merely as a means of protecting the health of the overworked bakers themselves.

A comparison of these decisions shows that they open an indefinitely large field to the exercise of the police power in the regulation of hours of labor. If a limitation of hours to ten a day for bakers can be justified as a means of protecting the community's bread, manifestly a large number of trades may be subjected to similar restrictions. It is certainly as important to the community to have its butchers, its cooks, and the thousands of employees of its transportation companies "well and not over-worked" as to have its bakers so. If the hours of those employed in mines and smelters may be limited to eight a day for the reason that longer hours are detrimental to health, what ground remains for opposing reasonable restrictions on hours

in any employments? It is incontestable that excessive hours of work of any kind are injurious to health. If a broad view be taken, it must be conceded that the full vigor and efficiency of the classes that work predominantly with their hands can only be maintained if time is given them for mental exercise. It is even more true that the best health of brain workers demands a definite period each day for muscular development. For these reasons, if the argument of the federal supreme court in the Utah case be generally accepted, may not the courts be relied upon to give an ever wider field to legislative discretion in this department of labor regulation? May not any restriction on hours which is defensible on economic grounds be properly characterized as a reasonable health measure and therefore brought within the pale of the police power? As regards this important class of regulations, also, the contention that the question of constitutionality is merely another phase of the question of economic expediency appears to be abundantly justified.

Space will not permit a discussion of other classes of restrictive labor laws. The same principles which have caused the courts to withdraw their opposition to truck acts, special Sunday closing laws for barbers, and acts restricting hours in special employments, are leading them to admit a large number of other measures within the pale of the police power. The legal phrases used — that the purpose of the act must be to protect the health or morals of the community, that it must be based on a reasonable classification, *etc.* — merely disguise the fact that to the courts, as presumably to the legislatures which enact the laws, the really decisive consideration is whether the restrictions are calculated to promote the general welfare. The chief difference is that the courts — at least nominally — withdraw their opposition when they are convinced that a good presumptive case can be made out for the law on the ground that the ultimate determination as to whether it is expedient or not belongs to the legislature, while the latter body in passing the law registers its view that the measure *is* expedient.

I have not attempted to discuss in this article the merits or demerits of the various laws that have been referred to. Many economists would not approve of the recommendation of the

United States Industrial Commission that "the [labor] provisions of the Utah constitution and statutes be followed in all the states,"[1] so that the eight-hour day for men employed in underground mines may become universal. All will agree, however, that we are much in need of further experience of the effect of regulations of this sort. Here as elsewhere it is only through experiment that the continually recurring differences between advocates of government regulation and of the *laissez-faire* policy can be adjusted. On this account the growing liberality of American courts in the scope they concede to the legislative police power should be ground for general satisfaction.

HENRY R. SEAGER.

[1] Report of the Industrial Commission, vol. v, p. 4.